



LP/12/2008

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANT – modification – 4 objections – ground (c) made out in relation to one objection but not others – ground (b) made out in relation to 3 objections only – ground (aa) made out in relation to 3 objections only – need for at least one ground to be satisfied in relation to all entitled to benefit – agreement with fourth objector on new restriction and compensation enabling ground (aa) to be applied

**IN THE MATTER OF AN APPLICATION UNDER
SECTION 84 OF THE LAW OF PROPERTY ACT 1925**

BY

ANTONY WILDE

**Re: Main Road
Long Bennington
Newark
Lincolnshire**

Before: The President

**Sitting at Lincoln Magistrates' Court, The Court House,
358 High Street, Lincoln, Lincolnshire LN5 7QA
on 24 February 2009**

Karen Walden-Smith instructed by Bird & Co of Grantham for the applicant
Marie-Claire Bleasdale instructed by Tallents of Newark for the objectors Mr Davis and Mr and Mrs Rodway
The objectors Mr and Mrs Craven in person

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DECISION

1. This application was the subject of a hearing before me in Lincoln at which the applicant and the objecting owners of three houses on the benefited land were represented. Agreement was, however, reached in principle between these parties and consequently the hearing was concluded without any evidence having been given. An agreed statement of facts and witness statements had been filed, and I was told that there was no difference between those parties on the factual matters set out. What follows is therefore based on that factual material and on the view that I had following the hearing.

2. The application is made in relation to a rectangular area of open land, 0.825 acre in extent, lying to the rear of a house and garage premises, 27/29 Main Road, Long Bennington, Newark. The applicant Mr Wilde bought 27/29 Main Road with his wife in 1973, and he has lived in the house, number 27, ever since. He has operated a garage business from number 29. He now owns the application land jointly with his children, Dominic Antony Wilde and Lisa Marie Pask. He and his wife bought the land in 1979, when it formed part of a filed OS 2273 owned by a farmer, George Edward Dring. In the conveyance, which was made on 7 September 1979, clause 2 provided as follows:

“The Purchasers so as to bind so far as may be the land hereby conveyed into whosoever hands the same may come and so that these covenants shall be for the benefit and protection of the adjoining land of the Vendor being Ordnance Survey number 2273 on the said Ordnance Survey map and containing four point six five six acres or any part or parts thereof hereby jointly and severally covenant with the Vendor that the Purchasers and those deriving title under them will at all times hereafter observe and perform the restrictions and stipulations following but so that neither the Purchasers nor those deriving title under them shall be personally liable for a breach of such of the said stipulations and obligations as are restrictive which may occur on or in respect of the land hereby conveyed or any part or parts thereof after they or either of them shall have parted with all interest therein:

- 1) Within six months of the date hereof at their own expense and in a proper and workmanlike manner and to the satisfaction of the Vendor to erect and make and forever thereafter maintain and keep in good repair a cattle proof fence along the entire length of the western boundary of the land hereby conveyed and marked with a ‘T’ inwards on the said plan
- 2) Not at any time hereafter to use or permit to be used the land or any part or parts thereof for any purpose other than as a garden and ground to the curtilage of the Purchasers adjoining house”

It is the restriction, (2), that is the subject of the present application.

3. Long Bennington is a settlement on the Great North Road. The A1 bypass was built in the 1960s to the west of the village. The subject land lies within a part of the settlement bounded by Main Road (the old Great North Road) to the east, what was the northern boundary

on the Manor Hotel to the north, Costa Row to the west and Vicarage Lane to the south. Numbers 27/29 are about in the middle of the length of the Main Road frontage.

4. At the time of the 1979 conveyance OS 2273 was in agricultural use. It was 5.39 acres in area, and the vendor, Mr Dring, grazed his cattle there. It extended to Costa Lane in the west. Abutting OS 2273 on its northern side was a field, OS 2580, 2.68 acres in area, which extended from the rear of two houses in Main Road to Costa Row in the west. To the north of OS 2580 was the village hall, the extensive grounds of the Manor Hotel (in the region of 3.5 acres) and 8 houses fronting Costa Row. The hotel buildings were in the western part of the grounds adjacent to the row of houses in Costa Row. Between OS 2273 and Vicarage Lane the land, extending perhaps to 8 acres, was undeveloped except for 3 houses and ancillary buildings. There was also a house on the Main Road frontage to the south of numbers 27/29.

5. In 1989 planning permission was granted on appeal for housing development on a site consisting of the Manor Hotel site, OS 2580, the part of OS 2273 that had been retained by Mr Dring in 1979 and the application land. The developer acquired all of this development site, with the exception of the application land, and an estate of between 40 and 50 houses was in due course built, 24 of them on OS 2273, the benefited land. Subsequently the frontage of Vicarage Lane has been developed, and a further close of houses is nearing completion on the large piece of land behind the frontage development on the eastern part of Vicarage Lane. The result is that the application land is, or shortly will be, surrounded on all sides by housing development. It is at present used as a paddock, stables having been constructed along part of the northern boundary, and it appears also to have been partly used for the storage of cars in connection with Mr Wilde's garage business at 29 Main Road. Substantial further residential development has taken place in recent years in nearby parts of Long Bennington, and this is continuing.

6. On 3 October 2006 planning permission was granted by South Kesteven District Council for the development of the application land and 27/29 Main Road with 14 houses. The application seeks modification of the restrictions in order to enable this development to be carried out. The grounds relied on are (a), (aa), (b) and (c) in section 84(1) of the Law of Property Act 1925. Objections were lodged by the owners of 25 Manor Drive (Mr and Mrs Craven), 33 Manor Drive (Mr Davis), 35 Manor Drive (Mr and Mrs Rodway) and by Mr Ablewhite and Ms Horner, who own a strip of land along the boundary of the application land. Mr Ablewhite is the developer who carried out the development of Manor Drive. There were no objections from the owners of the other 21 houses on the benefited land.

7. Mr and Mrs Rodway's house, 35 Manor Drive, is a two-storey building that backs on to the application land and is separated from it by a relatively shallow back garden. From the first floor windows there are unimpeded views across the application land. Mr Davis's house, 33 Manor Drive, is a single storey dwelling, again with a shallow back garden separating it from the application land. A fence and hedge along the boundary shut out views of the application land. Mr and Mrs Craven's house, 25 Manor Drive, has only a small frontage to the application land and is set back from it at an angle. There are views from the upper floor across the land.

In the course of the hearing agreement was reached in principle between the applicant and Mr and Mrs Rodway, Mr Davis and Mr and Mrs Craven, and the parties were left to agree the precise terms and to submit these to me. The process of agreeing the terms in the event proved intractable, but agreement was eventually reached between the parties in terms that included the payment of sums of money to Mr Davis and Mr and Mrs Rodway, the transfer of a piece of land (referred to as the Yellow Land) to Mr and Mrs Rodway, costs and the requirement that the parties enter into a deed modifying the restriction that is the subject of the present application. Under the terms of the deed the owners of the application land enter into further covenants restricting the use that can be made of the application land and two defined parts of it (referred to as the Green Land and the Blue Land) that are adjacent to the land of the objecting parties.

8. I infer from the fact that none of the owners of the other 21 houses on the benefited land have objected that they have by implication agreed to the proposed modification. In the light of the agreement reached with the objecting owners of the three houses, I would have concluded that the restrictions should be modified on ground (b) were it not for the fact that Mr Ablewhite and Mr Horner, although they did not appear at the hearing, have maintained their objection. Ground (b) is not satisfied unless “the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction” have agreed to modification, and this can only mean all the persons. It may be that the actions of the developer in obtaining planning permission in 1989 on land that included the application land constituted such agreement, but there is no sufficiently clear and uncontested evidence of his ownership of the benefited land at the material date that would enable me to draw such an inference. Ground (b) is therefore not made out.

9. The objection of Mr Ablewhite and Ms Horner is a purely financial one. They own what they regard as a ransom strip. It was, however, in my judgment, no part of the purpose of the restrictions to confer on the owners for the time being of the benefited land such a potential financial benefit. The restriction was imposed so that the covenantee’s enjoyment of his retained land would not be adversely affected by development of the land conveyed. In the circumstances Mr Ablewhite and Ms Horner would not in my judgment be injured by the proposed modification within the terms of ground (c). However, ground (c) only applies where the proposed modification will not injure “the persons entitled to the benefit of the restrictions”, and this can only mean all such persons. The owners of the three houses would undoubtedly be injured by the modification since it would enable houses to be built on adjoining land that is, under the terms of the restrictions, to be kept open. Ground (c) is therefore not made out.

10. It is a deficiency of the present law that there is no power to discharge or modify a restriction unless one of the grounds is made out in relation to all those entitled to the benefit. It is not sufficient that one ground is satisfied in relation to some of those entitled to the benefit and another ground is satisfied in relation to all the other persons entitled to the benefit. It is to be hoped that legislation following the current work of the Law Commission on covenants and easements will make good this deficiency.

11. I turn then to ground (aa). I am satisfied in relation to Mr Davis and Mr and Mrs Craven that the effect of development of the application land in accordance with the 2006 planning permission, though it would injure them, would not do so to the extent that their power to prevent it would constitute a practical benefit of substantial value or advantage to them within the meaning of subsection (1A). Money would be an adequate compensation for the loss or disadvantage that they would suffer. Ground (aa) is therefore made out in relation to them. The impact of development under the 2006 planning permission would, however, in my judgment have such an adverse impact on Mr and Mrs Rodway's house, that ground (aa) would not be made out in relation to them in the absence of the agreement that has now been entered into. But that agreement provides for the transfer to them of an area of land 10m wide from the application land and thus gives them a significant buffer from the proposed development. In view of their entitlement to this land under this agreement I conclude that the restriction no longer secures a practical benefit that is of substantial value or advantage to them and that money would be adequate compensation. Ground (aa) is thus made out in relation to them. It is also necessarily made out in relation to Mr Ablewhite and Mr Horner, who, as I have said, would suffer no injury; and I am satisfied, on the basis of my view and the absence of objection that it is made out in relation to the owners of the 21 houses who have not objected to the application.

12. In these circumstances I do not need to consider ground (a).

13. I accept that the new restrictions that the applicant has agreed should be added (in the exercise of the power of the Tribunal that is declared in subsection (1C)), as being reasonable in view of the relaxation of the existing provisions. These further restrictions are set out in the Appendix to this decision, and an order will be prepared that incorporates Plan 1 and Plan 2 which are there referred to. (They are the plans annexed to the deed that the parties have agreed to execute). It appears that the detailed planning permission granted by South Kesteven District Council on 3 October 2006 will not as it stands be capable of implementation without conflicting with the new restrictions. It would not therefore be appropriate for me to order the modification of the application restriction specifically so as to permit the development of the application land in accordance with this permission. I will therefore order modification so as to permit the development of the application land with not more than 14 houses.

Dated 24 April 2009

George Bartlett QC, President

Appendix

Further restrictions

1. Green Land

For the benefit of the Yellow Land and each and every part of it, of 25 Manor Drive and each and every part of it, of 33 Manor Drive and each and every part of it and 35 Manor Drive and each and every part of it so as to bind the Green Land and each and every part of it into whosoever hands the same may come:

- (a) Not to use the Green land otherwise than as gardens for the dwellings to be erected on the Blue Land.
- (b) Not to erect or cause to be erected on the Green Land any buildings or structure whatsoever except standard garden sheds no larger than 8 foot by 6 foot and of not greater height than 7 foot, and so that there is no more than one such shed per dwelling erected on the Blue Land,
- (c) Not to extend or cause to be extended onto the Green Land any buildings or structures erected on the Blue Land.

2. Blue Land

For the benefit of the Yellow Land and each and every part of it, of 25 Manor Drive and each and every part of it of 33 Manor Drive and each and every part of it and 35 Manor Drive and each and every part of it so as to bind the Blue Land and each and every part of it into whosoever hands the same may come:

- (a) Not to erect or cause to be erected on the Blue Land any buildings or structures other than single storey residential dwellings (“bungalows”), together with associated single storey garages, of which there shall be no more than 3 bungalows and 3 single storey garages and which comply with the following requirements
 - (i) The bungalows and garages must be no more than 5.6 metres in external height measured from existing ground level.
 - (ii) The bungalows and garages must not have any dormer windows or windows in the roof.
 - (iii) The bungalows and garages must not have anything other than roof storage space in the roof void.
- (b) Not to use the Blue Land otherwise than for the purposes set out in Further Restriction 2(a) above, or as garden or curtilage to those dwellings.

3. **The Paddock**

For the benefit of the Yellow Land and each and every part of it, of 25 Manor Drive and each and every part of it, of 33 Manor Drive and each and every part of it and 35 Manor Drive and each and every part of it so as to bind the Paddock and each and every part of it into whosoever hands the same may come:

- (a) Not to use the Paddock otherwise than as garden or as the curtilage to the house at 27 Main Street until 3 detached single storey residential dwellings have been erected on the Blue Land.
- (b) Once the single storey dwellings proposed have been erected on the Blue Land not to use, or permit or suffer any person under their control to do so, the Paddock otherwise than as a residential estate and ancillary development.
- (c) Not, during the course of the erection of the dwellings proposed to be erected on the Paddock, to carry out either internal or external building works on the Paddock save between the hours of 8 am and 6 pm on weekdays (excluding bank holidays).

Definitions

In the Further Restrictions, unless the context otherwise requires, the following words and expressions have the following meanings:

- ‘The Paddock’ means the freehold land registered at HM Land Registry under title number LL267516 which is shown edged in red on Plan 2.
- ‘The Field 2273’ means that part of the field which in 1979 had Ordnance Survey number 2273 for the benefit and protection of which the restrictive covenants set out in the conveyance dated 7 September 1979 were taken.
- ‘The Yellow Land’ means the area of land, being part of the Paddock, shown shaded in yellow on Plan 1 where:
- i. the dimension marked A is 10m
 - ii. the dimension marked B is equal to the total width of the eastern boundary of 35 Manor Drive and the right of way that runs along its southern side.
- ‘The Green Land’ means the area of land, being part of the Paddock, shown shaded in green on Plan 1 where:
- i. the dimension marked A is 10m
 - ii. the dimension marked c is 15m
 - iii. the line marked D to E falls on the circumference of a circle with a radius of 15 metres with its centre at the point marked F.

- ‘The Blue Land’ means the area of land, being part of the Paddock, shown shaded in blue on Plan 1 where:
- i. the dimension marked A is 10m
 - ii. the dimension marked G is 25m
 - iii. the line marked H to J falls on the circumference of a circle with a radius of 25 metres with its centre at the point marked F.
- ‘The XY strip’ means the strip of land 6 inches wide running along the eastern boundary of 33 and 35 Manor Drive and lying between 33 and 35 Manor Drive and the Paddock shown marked in purple on Plan 1.
- ‘25 Manor Drive’ means all that piece and parcel of land registered at HM Land Registry under title number LL110817.
- ‘33 Manor Drive’ means all that piece and parcel of land registered at HM Land Registry under title number LL112250.
- ‘35 Manor Drive’ means all that piece and parcel of land registered at HM Land Registry under title number LL123942.